No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH and EMILIE FURNISH FUNK,

Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the United States.

APPELLANT RICHARD DOUGLAS FURNISH'S CLOSING BRIEF.

MURRAY M. CHOTINER,

600 Fox Wilshire Theatre Bldg.,
202 S. Hamilton Drive,
Beverly Hills, California,

Attorney for Appellant,
Richard Douglas Furnish.

The Myers Legal Press, Los Angeles. Phone MA. 29007.

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I.

The Correct Amount of Taxable Income Is Provided More Accurately by Petitioner's Net Worth Statement.

Respondent relies on the Hill audit to establish the income of the petitioner for the years in question. It is conceded that Hill did not testify, and when respondent in his Opening Brief (p. 10) states that Hill examined the patient record cards and that the cards were looked over with employees of the taxpayer, respondent is merely relating what another witness, Agent Marvin H. Ness, testified. In short, Mr. Ness was relating a conversation with Mr. Hill [Tr. of Record, pp. 409-410]. Testimony of witnesses at the time of the hearing before the Tax

Court demonstrated that one could not determine from an inspection of the patient record card whether the item was paid or whether a patient was merely given credit for certain amounts; yet it is the patient record card which was used as the basis for the Hill report. Respondent, in using the Hill report, is resting his case on conjecture and surmise [Tr. of Rec. pp. 461-466; 472-474; 400-419].

Respondent, in his schedule of net income reported for 1945, shows a figure of $19,950.18 (Resp. Br. p. 14). However, the correct figure should be $26,950.18 [Ex. 1; Stipulation, Item 4].

Respondent in his summary of argument (Resp. Br. p. 17) states that the only issue in the case is whether the determination of the taxpayer's gross professional receipts is sustained by the evidence. Petitioner contends that it is appropriate to state that the evidence should be competent and worthy of credence. Evidence such as the Hill report and the testimony of Duelke do not come within that category.

It is interesting to note that the Commissioner refuses to accept the net worth statement of the taxpayer as an accurate statement of his assets, and asserts that the Commissioner cannot be compelled to accept it (Resp. Br. p. 18). Apparently it is too much to expect the Government to be consistent. In case after case the Internal Revenue Service relies on a net worth statement as the basis for asserting tax deficiencies. The respondent did not object at any time to the items set forth in the net worth statement. The net worth statement presented a complete report of the assets of the taxpayer, but respondent prefers to rely on the Hill report, notwith-

standing the fact that one can not tell from the patient record card whether a wavy line means that the item was paid or whether it means that a credit was given without a payment being made. No objections were made by the respondent pertaining to the schedules submitted in the petitioner's net worth statement [Tr. of Rec. pp. 258; 264; 275-276; 279; 281-284; 287-288].

Respondent objects to the net worth statement because he states the net worth statement is based on the taxpayer's statement of his opening cash (Resp. Br. p. 27). Respondent apparently overlooks the testimony of the accountant, Alvin P. Meyers. Mr. Meyers prepared the net worth statement and establishes the logic of the net worth statement when he pointed out that the doctor had to have money in order to spend it [Tr. of Rec. pp. 243-245]. Petitioner in his Opening Brief, pages 20-21, illustrated that the auditor was correct. Dr. Furnish could not buy property and pay for it unless he had cash with which to do it. Therefore, it is reasonable to conclude that he must have had the amount of cash on hand for the years in question, since he acquired additional properties for the identical years. As an illustration, there was a total increase in assets during 1944 of $95,500.00. It is unreasonable to believe that cash amounting to $94,500.00 was acquired during the previous year; but instead, it is the result of the acquisition of money over a number of years. Other illustrations were pointed out in Appellant's Opening Brief, pages 20-21.

It is difficult to believe respondent really means what he says when he states that the argument about wavy lines and other symbols on the cards is beside the point (Resp. Br. p. 28). Petitioner does not rely simply on argument; he is relying on the evidence. The testimony

of witnesses was uncontradicted to the effect that sometimes a wavy line meant the amount had been paid; sometimes it meant the patient had been given a credit; sometimes the word "paid" meant the item was collected; sometimes it meant the account was merely closed out or written off; there were instances when a patient was not financially able to pay and a wavy line was drawn to indicate not to send any more statements [Tr. of Rec. pp. 461-466; 472-474; 400-419].

Ruby Saunders, an employee of the petitioner, stated she told Mr. Hill that a wavy line meant it had been paid or had been cancelled [Tr. of Rec. p. 461]. She did not explain to Mr. Ness what the wavy lines or "cr" meant; she could not state what the insignia "cr" meant on every card [Tr. of Rec. pp. 463-465].

Irma Wheeler, another employee of the petitioner, testified that the wavy line meant that the payment had been made in some cases and in other cases just written off; there would be no way of determining which it was by looking at the card [Tr. of Rec. p. 473]. She could not tell by looking at the card whether "cr" meant the money had been collected or that the doctor had given a credit to the patient; and the word "paid" could have meant that it had been written off or had been uncollectible [Tr. of Rec. pp. 474-475].

II.

Respondent Has Not Sustained Burden of Proof of Establishing Fraud.

Respondent claims that the petitioner, Dr. Furnish, used nominees to report gains derived from the sales of property and thereby evaded substantial amounts of income tax (Resp. Br. p. 7). However, respondent is over-

looking the common impression that people have to the effect there is only a 25% tax on long-term capital gains. Most people are of the opinion that it is only necessary to pay a 25% tax in the event of a long-term capital gain. It is respectfully submitted that one almost has to be an expert on the subject of income tax to realize that there are instances when more than a 25% tax is paid, in the event of a long-term capital gain. The petitioner obviously was in error in thinking that the full tax was paid on the long-term capital gains by the nominees instead of by him, but a mistake in judgment does not constitute fraud.

Respondent refers to the bank accounts being carried in the name of employees or relatives (Resp. Br. p. 8). It should be noted that the accounts in the names of relatives were in small amounts, and are of no real concern. As an illustration, one of the accounts was used by a relative who was looking after the house of the petitioner. It is obvious that this did not constitute any attempt to hide assets.

As far as the account in the name of Herman Duelke is concerned, it should be noted that the account on its face showed that the account did not belong to Herman Duelke; it bore a designation after his name as either "business manager" or "trustee." It is normal practice for doctors to carry their business accounts in the name of the business manager. The business affairs of the office were conducted by Mr. Duelke. The account was carried in his name so he could issue checks without having to get the signature of Dr. Furnish, who was busily engaged in the practice of medicine. The address of Mr. Duelke on the account was the business address

of Dr. Furnish. It is only natural that since Mr. Duelke's business address was the same as the petitioner's and since the account involved the business affairs of the petitioner, that Mr. Duelke should use the business address which was common to both of them.

Respondent makes mention of the testimony of Mr. Duelke wherein Duelke stated that Dr. Furnish would not allow him to install an accurate record system and that the doctor had stated he had been previously investigated and had removed some of his records (Resp. Br. p. 9).

It should be noted that it was the testimony of Duelke that was used by the respondent primarily to show fraud.

As pointed out in Appellant's Opening Brief, pages 29-30, Duelke's credibility collapses when we consider the testimony of Edward Anspach, a disinterested witness. Bias, interest and motive on the part of Duelke are clearly shown in the fact that Dr. Furnish fired Duelke [Tr. of Rec. p. 391].

Mr. Anspach testified that he learned that Duelke was fired from Duelke himself [Tr. of Rec. p. 391], but Duelke even denies that he was fired; he even denies he told Mr. Anspach that he was fired [Tr. of Rec. pp. 454-455]. The only logical conclusion to be drawn from the evidence is that Mr. Duelke took it on himself to sell the Hinton Arms Apartments without any authorization from his employer. When Dr. Furnish first learned about it from Mr. Anspach he was pretty disturbed and was not very happy about it. He did not want to sell the property [Tr. of Rec. pp. 382-392].

Respondent relies on a number of circumstances to establish fraud. It is clearly established that the burden

of proof of establishing fraud is on the respondent. It is suggested that this burden has not been met when we view the set of circumstances in a light which is reasonable and favorable to the petitioner. The use of nominees was due to fear of creditors and the desire on the part of the petitioner that his wife not be informed of his assets; the "25% capital gains tax" was misunderstood by the petitioner, the same as it is misunderstood by most taxpayers. The bookkeeping system was a poor one; the doctor was secretive, but that does not establish guilt of actual fraud with the specific intent to evade income taxes. It is only natural to assume that the doctor, the same as most taxpayers, would believe that the person who receives the dividends would be the individual who would have to pay income tax on them. In this case dividends were received and retained by a nominee; the tax was paid by the nominee.

Conclusion.

Since the net worth statement should be the basis for determining the tax deficiency, and since the respondent did not sustain the burden of proof of establishing fraud, the decision of the Tax Court should be reversed.

Respectfully submitted,

MURRAY M. CHOTINER,

Attorney for Petitioner, Richard Douglas Furnish.